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No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

NIKOLAAS "KALLIE" KNOETZE, PETITIONER,

VS.

UNITED STATES OF AMERICA,
THE DEPARTMENT OF STATE, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether or not an alien, legally within this country, is entitled to procedural and substitutive due process in the instance of a revocation proceeding undertaken by the State Department against his visa. The United States Court of Appeals for the Fifth Circuit, Circuit Judge Hatchett writing the opinion, unanimously concluded that the Petitioner has no constitutionally protected liberty and property interest in the visa that was issued to him and on which he travelled and made legal entry into this country and therefore, declined to hold that the due process rights guaranteed by the Constitution of the United States under the Fifth Amendment applied to said revocation proceeding.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nikolaas "Kallie" Knoetze, by and through his attorney, Michael J. Ryan, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the lower court denial of his request for a permanent injunction.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

Nikolaas "Kallie" Knoetze, Plaintiff, vs. *United States of America, The Department of State, et al.*, Defendants, 472 F.Supp. 201.

Nikolaas "Kallie" Knoetze vs. *United States of America, The Department of State, et al.*, #79-2293, 5th Cir., decided January 12, 1981.

Copies of the reported opinions are appended hereto as Appendices A and B as provided in subparagraph 1(k), Rule 21, Rules of the Supreme Court.

JURISDICTION

Petitioner invokes this court's jurisdiction to review the Final Judgment of the United States Court of Appeals, Fifth Circuit, decided January 12, 1981, judgment having been entered that same date.

There was no motion for rehearing nor any motion for an extension of time within which to file this Petition for Certiorari.

Petitioner seeks jurisdiction under Part V, Rule 17, 1, (a), Rules of the Supreme Court, 28 U.S.C.A.; and Petitioner particularly calls this Court's attention to the matter of *Philip Agee v. United States*, ____ F.2d ____ (D.C. June 27, 1980). This Court granted certiorari in *Agee* on October 6, 1980. Also, *U.S. ex rel Strachey v. Remier*, 101 F.2d 267 (2nd Cir. 1939). It is Petitioner's contention that the decision in the case at bar is in conflict with the holdings in the foregoing two cases.

The basis for the Federal jurisdiction in the court in the first instance has been established under case law and, in the case at bar, the District Court relied on *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U.S. Constitution
Amendment V

8 U.S.C.A. 1201(i)

Text located in Appendices C and D

STATEMENT OF THE CASE

A concise statement of the case containing the facts material to the consideration of the question presented is found both in Statement of Facts and the Statement of the Case of Judge Roettger as presented in the trial court opinion attached hereto in the appendix and in the Statement of the Facts and the Case presented by the United States Court of Appeals in the decision written by Circuit Judge Hatchett. Petitioner would respectfully defer to those statements since they are very detailed, complete and accurate and the Petitioner would care to adopt those statements with this Court's permission.

Briefly stated, the State Department revoked Petitioner's visa at a time when he was an alien legally within this country on a valid passport seeking a change of status from B-1/B-2 to H-1/H-2 so that he could engage in a boxing match in Miami

Beach, which was the purpose of his trip to this country. Petitioner sought a permanent injunction. A temporary restraining order was granted but the permanent injunction was denied and Petitioner appealed. The Fifth Circuit Court of Appeals affirmed the decision of the Federal District Court for the Southern District of Florida. Petitioner seeks a Writ of Certiorari to the Fifth Circuit.

It is Petitioner's contention that his visa was revoked by the State Department without notice or hearing and that the revocation proceeding was not conducted with any element of fairness. The revocation of Petitioner's visa by the State Department took place while Petitioner was an alien legally within this country. Therefore, Petitioner contends he was entitled to notice and a fair hearing.

REASONS FOR GRANTING THE WRIT

A number of issues were presented to the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Fifth Circuit, including the matter of impermissible political influence a/k/a *ex parte* influence. After this case was presented both to the District Court and the Court of Appeals the ultimate decision was based on the fact that the Court of Appeals determined that the Petitioner was not entitled to his Fifth Amendment rights of due process as they related to the revocation proceeding by the Secretary of State. It is Petitioner's contention that he was entitled to the protection of the Fifth Amendment as it pertained to the revocation of his visa. In support of said contention, the Petitioner points out that it is undisputed that an alien is entitled to the protection of the Constitution when he is legally (and in most cases when he is illegally) in this country. *Doe v. Plyer*, ____ F.2d ____ (5th Cir. Oct. 20, 1980). The Court of Appeals determined that the due process

rights under the Fifth Amendment were not relevant since the revocation proceeding is not one to which said protections should be applied. In light of *Agee v. United States*, ____ F.2d ____ (D.C. 1980), and especially in light of Judge MacKinnon's dissent on page 9, Petitioner disagrees. In the *Agee* case, Philip Agee was traveling abroad. His passport was going to be revoked for good cause. Philip Agee was advised by letter of the pending revocation proceeding and was given notice and an opportunity to be heard, of which he refused to avail himself. In fact, the Secretary of State, recognizing the gravity of such an action as it related to the individual rights of Philip Agee, wrote in the letter to Agee that the Secretary of State would arrange for a hearing where Mr. Agee could present evidence on an emergency basis at a time and place to suit Agee's convenience.

In the case at bar, the Secretary of State not only has consistently denied that the Petitioner had any right to notice or hearing but the Secretary of State has gone further and, as can be seen from the Statement of Facts in the opinion of Judge Roettger, the Secretary of State did have *ex parte* communications unfavorable to Petitioner from the Rev. Jesse Jackson, SWAPO, *et al.*, which the Secretary of State failed to note in Petitioner's file. The Secretary of State failed to provide the Petitioner any opportunity to refute the prejudiced communications despite the fact that Petitioner's whereabouts was well known. In other words, in the case of an American traveling abroad where the Secretary of State was considering a revocation of said American's passport, the Secretary of State clearly recognized the gravity of such a matter and determined that said American was entitled to his due process rights and proceeded accordingly. In the case of your Petitioner, an alien legally within the United States with a valid visa, the Secretary of State has done everything from the beginning to prevent the Petitioner from having a hearing where the fundamental essential elements of fairness would be present.

It is Petitioner's position that the Court of Appeals erred when it declined to hold that a valid visa legally obtained and relied upon for travel to this country is something to which the Petitioner had no interest in or right sufficient to support his contention that the revocation of the same would have to be proceeded on in such a matter as would respect your Petitioner's constitutional rights under the Fifth Amendment.

In further support of Petitioner's contention, the court is directed to the case of *U.S. ex rel Strachey v. Remier*, 101 F.2d 267 (2nd Cir. 1939). Justice Hand found that travel to the United States by an alien in reliance upon a validly issued visa was sufficient to estop the American Consul abroad from revoking the same after said alien had embarked. Justice Hand recognized the inherent unfairness of allowing a foreigner to make the trip to our shores in reliance on a valid visa only to have the same revoked based on some plenary authority void of the essential elements of due process. A reading of the decision indicates that the conclusion would have been the same even if the right to revoke was implied from the right to issue the visa in the first place, or even if the right to revoke had been specifically granted by Congress at that time, as is the case now under 8 U.S.C.A. 1201(i).

Lastly, Petitioner asks this Court to note the significance of the fact that as a professional boxer, his ability to make a living in that field is contingent on his ability to travel to matches and, as in this case of his fight with Sharkey, his ability to have H-1/H-2 status so that he can participate in the United States, which is the "Big Apple" in the international boxing world. Said status was and is surely contingent on Petitioner's having

a valid visa. The present status of the State Department file as it stands will forever bar this possibility and add further economic injury to that which Petitioner has already suffered.

Respectfully submitted,

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P.O. Box 129
Port Arthur, Texas 77640
1-800-231-9240

April 10, 1981

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished to Solicitor General, Department of Justice, Washington, D.C. 20530; Atlee Wampler, U.S. Attorney, 155 S. Miami Ave., Miami, FL 33130; and Peter Nimkoff, Special Assistant U.S. Attorney, 616 Dade Federal Building, 101 E. Flagler St., Miami, FL 33131, by mail this 10th of April, 1981.

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APPENDICES

APPENDIX A

Nikolaas "Kallie" KNOETZE,
Plaintiff-Appellant,

v.

The UNITED STATES of America, The DEPARTMENT OF STATE et al.,
Defendants-Appellees.

No. 79-2293.

United States Court of Appeals,
Fifth Circuit.
Unit B

Jan. 12, 1981.

Alien brought action against the Department of State seeking permanent injunction against revocation of his entry visa. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., refused to grant the injunction and held that alien's visa was lawfully revoked, 472 F.Supp. 201, and alien appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) Secretary of State had statutory power to revoke alien's visa even after he entered the United States; (2) revocation of the visa was subject to judicial review; (3) the Secretary of State lawfully acted within his discretion in revoking alien's visa because of his conviction for a South African crime reasonably believed to correspond to an American felony involving moral turpitude; and (4) revocation of the visa without notice complied with due process rights.

Affirmed.

Michael John Ryan, Port Arthur, Tex., for plaintiff-appellant.

Peter Nimkoff, Spec. Asst. U.S. Atty., Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

In this case we have determined that Congress has conferred upon the Secretary of State, through 8 U.S.C. § 1201(1), the power to revoke a visa issued to an alien who has entered the United States. We have reviewed the Secretary's revocation of the visa issued to appellant Nikolaas Knoetze under the standards of the Administrative Procedure Act, 5 U.S.C. § 706(2), and find that the Secretary lawfully acted within his discretion. We reject Knoetze's contention that the revocation of his visa without notice violated constitutionally mandated due process of law. We therefore affirm.

FACTS

The trial court has extensively described the facts and procedural history of this case. *Knoetze v. United States*, 472 F.Supp. 201 (S.D.Fla. 1979). We summarize them as follows.

Knoetze, a world-class boxer and former policeman from South Africa, came to the United States on a non-immigrant visa to take part in a prize fight. Knoetze then discovered through the news media that his visa had been revoked. The Secretary of State revoked his visa after concluding that Knoetze was convicted in South Africa of a crime corresponding to an American felony involving moral turpitude. The Immigration and Nationality Act renders such foreign convicts ineligible for a visa of entry into our country. 8 U.S.C. § 1182(a)(9).[1]

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[1] Title 8, section 1182(a)(9) of the United States Code provides, in pertinent part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

continued on next page

Knoetze received a preliminary injunction against deportation and competed in the prize fight. He also applied for an H-class visa, which would have permitted him to work in this country. The Immigration and Nationalizaton Service (INS) denied this application because of the Secretary's act of revocation.

The trial court refused to grant a permanent injunction against the revocation of Knoetze's visa. The court agreed with Knoetze that the Secretary's act of revocation was subject to judicial review. The court also considered Knoetze's charge that civil rights leaders had exerted such intense political pressure upon the executive branch as to constitute impermissible levels of "political interference." Yet the court accepted the position of the Secretary that Knoetze's visa was lawfully revoked because of an admitted conviction in South Africa for a crime which the Secretary reasonably viewed as equivalent to an American felony involving moral turpitude.

This South African crime is entitled "Attempting to Obstruct or Impede the Process of Justice." The indictment to which Knoetze pled guilty alleged that he made several false statements while serving as a policeman in order to persuade citizens of his country to drop assault charges against a fellow police officer. The trial court accepted the conclusion of the Secretary that Knoetze's criminal conduct corresponded to the United States felony of "Influencing or Injuring an Officer, Juror or Witness," 18 U.S.C. § 1503, a felony involving moral turpitude. The trial court therefore upheld the Secretary's act of revocation.

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> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) . . . . Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18, by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an offense that is classifiable as a misdemeanor under the provisions of section 1(2) of Title 18, by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible . . . .

ISSUES

Knoetze's appeal of this decision raises the following issues:

(1) May the judiciary review the Secretary's revocation of a visa held by an alien within our country?

(2) If so, what are the appropriate standards of review at the trial and appellate levels?

(3) Does the Secretary have the power to revoke visas issued to those already within our country?

(4) If so, what limits exist upon his power?

(5) Did the Secretary violate any such limitations when revoking Knoetze's visa?

JUDICIAL REVIEW

[1] We agree with the trial court that the judiciary may review a decision by the Secretary of State to revoke the visa of an alien within our country. On appeal, the government has dropped its argument of non-reviewability.

The proper standard of judicial review is expressed in the Administrative Procedure Act, 5 U.S.C. § 706(2). This is the limited standard of review applicable in the analogous context of deportation proceedings. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950); *Jarecha v. Immigration and Nationalizaton Service*, 417 F.2d 220 (5th Cir. 1969). The relevant portions of this Act provide:

The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;

* * *

[2] Under this limited standard of review, we can enjoin the revocation of Knoetze's visa only if the Secretary has violated the law or committed a clear error of judgment. *Bowman Transportation, Inc. v. Arkansas—Best Freight Systems, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *Refrigerated Transportation Co. v. ICC*, 616 F.2d 748 (5th Cir. 1980). Our standard of review is the same as that of the trial court.

Congress has conferred upon the Secretary the power to revoke a visa in the following language: "After the issuance of a visa or other documentation to any alien, the consular officer, or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation." 8 U.S.C. §1201(i). No court has been called upon to decide whether this broad language confers authority upon the Secretary to revoke the visa of an alien after his entry into our country.

Knoetze argues that § 1201(i) merely confers revocation power prior to an alien's entry into the United States. He makes three supporting arguments. First, the overall statute to which this section belongs addresses the procedures for the issuance of visas to foreigners seeking initial entry. 8 U.S.C. §§ 1151-1230. The language of § 1201(i) itself, after authorizing visa revocation, goes on to treat the liabilities of a transportation company that brings aliens into the country after the revocation of their visas.[2]

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[2] Title 8, section 1201(i) of the United States Code provides:

> After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documenta-

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Second, Congress entrusted major responsibility over aliens within the country to the Attorney General, rather than the Secretary of State, under a wholly different statutory scheme. 8 U.S.C. §§ 1251-60.

Third, Knoetze argues that the provision of due process safeguards in the Attorney General's deportation authorization, § 1252(b), coupled with the absence of any such safeguards in the Secretary's visa revocation authorization, § 1201(i), indicates a legislative intention of assigning responsibility for handling aliens within our country to the Attorney General, rather than the Secretary of State. Knoetze bolsters this argument by noting that aliens within the country are constitutionally entitled to procedural due process, while those outside the country receive no constitutional protection. *Shaughnessy v. United States*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). He contends that in recognition of this distinction, Congress provided procedural safeguards in the Attorney General's deportation authorization because Congress intended the Attorney General to have responsibility over aliens after their arrival. We disagree.

[3] We accept the argument of the government that § 1201(i) means exactly what it says: the Secretary may revoke an alien's visa "at any time." We reject Knoetze's invitation to limit this clear and broad language. We must assume that Congress used the unambiguous words "at any time" as they are commonly understood, even if a different interpretation would yield a result we would prefer. *United States v. Stewart*, 311 U.S. 60, 61 S.Ct. 102, 85 L.Ed. 40 (1940); *United States v. Porter* 591 F.2d 1048 (5th Cir. 1979). Moreover, we accord considerable deference to the interpretation of § 1201(i) by the Department of State, the agency empowered by

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> tion from the date of issuance: *Provided*, That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 1323(b) of this title for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation.

Congress to administer the issuance and revocation of visas. *E. I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 97 S.Ct. 2229, 53 L.Ed.2d 100 (1977). We hold that Congress has conferred upon the Secretary the authority to revoke the visa of an alien "at any time," even after he has entered our country.

[4] We must now consider the substantive and procedural limitations upon the power conferred by § 1201(i). These limitations are implicit in the standard of review expressed in the Administrative Procedure Act, 5 U.S.C. § 706(2): (a) the Secretary must comply with any statutory procedures for the revocation of a visa; (b) the Secretary's act of revocation must not exceed his statutory authority; (c) the Secretary may not abuse his discretion by acting capriciously in revoking a visa; and (d) the Secretary must respect the constitutional rights enjoyed by visa holders within our borders.

The Secretary's method of revoking Knoetze's visa violated no statutory procedural requirements because the authorizing statute contains no procedural requisites. 8 U.S.C. § 1201(i). The Secretary acted within the bounds of his statutory authority because § 1201(i), as interpreted above, permitted the Secretary to revoke Knoetze's visa even after Knoetze had fully entered our country.

[5] We further find that the Secretary lawfully acted within his discretion in revoking Knoetze's visa. The trial court determined that the Secretary revoked Knoetze's visa not because of impermissible "political interference," but because of Knoetze's conviction for a South African crime reasonably believed to correspond to an American felony involving moral turpitude. We agree.

Strong evidence of the politicalization of an otherwise routine, bureaucratic decision might raise a suspicion of discriminatory agency action. In this case, however, it is indisputed that Knoetze pled guilty to the South African crime of "Attempting to Obstruct or Impede the Process of Justice." Those who have been convicted abroad of a crime equivalent to a felony involving moral turpitude are ineligible under the Immigration and Nationality Act to hold a visa for entry into the United States. 8 U.S.C. § 1182(a)(9).

The American consul in South Africa issued Knoetze a visa because it believed that his offense fell within the misdemeanor petty

offense exception of this Act. 8 U.S.C. § 1182(a)(9). The Secretary later concluded that Knoetze's conviction corresponded to a conviction for a felony involving moral turpitude. Because South African law differs greatly from American law, the Secretary compared the South African crime of "Attempting to Obstruct or Impede the Process of Justice" to the federal crime of "Influencing or Injuring an Officer, Juror or Witness," 18 U.S.C. § 1503.[3] The acts prohibited by § 1503 constitute a felony. *See* 18 U.S.C. § 1(1).[4] The misdemeanor petty offense exception is therefore inapplicable. The fraudulent acts prohibited by § 1503 also indicate moral turpitude: "fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude." *Jordan v. DeGeorge*, 341 U.S. 223, 229, 71 S.Ct. 703, 706, 95 L.Ed. 886 (1951). The Secretary thus concluded that Knoetze was ineligible for a visa under 8 U.S.C. § 1182(a)(9).

The method followed by the Secretary of comparing foreign and American law to determine the degree of culpability of foreign criminal acts has already received judicial approval. *Soetarto v. Immigration and Naturalization Service*, 516 F.2d 778 (7th Cir. 1975); *Giammario v Hurney*, 311 F.2d 285 (3d Cir. 1962). The conclusion reached by the Secretary in this case does not appear to be arbitrary

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[3] Title 18, section 1503 of the United States Code provides, in pertinent part:

> Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate . . . or corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[4] Title 18, section 1(1) of the United States Code provides, in pertinent part: "Notwithstanding any Act of Congress to the contrary: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony."

or capricious or otherwise abusive of the discretion conferred upon him by § 1201(i). Even if experts differ as to whether Knoetze's foreign conviction corresponds to a felony involving moral turpitude, and even if hindsight shows that the Secretary has erred, his methods and conclusions appear entirely reasonable.

[6] We must now determine whether the revocation of Knoetze's visa without notice complied with the due process rights guaranteed by the Constitution. The fifth amendment to the Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Fifth amendment protection extends to all persons, including aliens, within the borders of the United States. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953). Yet fifth amendment protection attaches only when the federal government seeks to deny a liberty or property interest. *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Downing v. Williams*, 624 F.2d 612 (5th Cir. 1980).

Knoetze argues that he has such a protected interest in the retention of his entry visa. He points out that he was denied a working visa by INS because of the revocation of his entry visa by the State Department. He contends that by denying him the opportunity to work in our country, the government effectively denied him the ability to remain here. Knoetze therefore urges us to recognize the constitutionally protected liberty and property interest in the retention of his visa. We decline.

[7] We accept the position of the government that the revocation of an entry visa issued to an alien already within our country has no effect upon the alien's liberty or property interests. Revocation of an entry visa by the Secretary does not automatically lead to deportation of the alien. Congress has entrusted deportation to a different department of the government, the Attorney General, and established different criteria for deportation than those for visa issuance and revocation. 8 U.S.C. § 1251 (Deportable Aliens — General Classes). Moreover, Congress has provided extensive procedural safeguards to those subject to deportation, including the right to reasonable notice, a fair hearing, opportunity for cross-examination and legal representation. 8 U.S.C. § 1252(b). Since

deportation does not automatically follow visa revocation and any resulting deportation proceeding includes significant procedural safeguards, we hold that the revocation of an alien's visa jeopardizes no liberty or property interest entitled to constitutional protection.

CONCLUSION

We hold that the Secretary of State has the power under 8 U.S.C. § 1201(i) to revoke the visa of an alien even after an alien has entered the United States. We affirm the decision of the trial court that the revocation of a visa issued to an alien within the United States is subject to judicial review. We review such revocations under the Administrative Procedure Act, 5 U.S.C. § 706. We find no abuse of discretion in this case and no constitutional requirement of notice prior to revocation.

AFFIRMED.

APPENDIX B

Nikolaas "Kallie" KNOETZE, Plaintiff

v.

The UNITED STATES of America, the Department of State, Cyrus Vance, Secretary of the Department of State, the Immigration and Naturalization Service of the United States, Mr. Gullage, Acting Director of Immigration and Naturalization Service, Miami, Florida, the United States Marshal, all Deputy Marshals for the Southern District of Florida, all other Enforcement Officers for the Above Agencies or their Agents, and the Attorney General of the United States, Defendants.

No. 79-113-Civ.-NCR.

United States District Court,
S. D. Florida,
Ft. Lauderdale Division

March 16, 1979.

Alien brought action against United States, Department of State and others seeking permanent injunction against revocation of visa by Secretary of State. The District Court, Roettger, J., held that: (1) any defect in temporary restraining orders announced from the bench was waived; (2) defendants offered no evidence of congressional intent to preclude review of visa revocation decision; (3) Immigration and Nationality Act presented body of applicable law which could not be ignored by Secretary in regard to aliens already admitted to country, and thus decision to revoke visa was subject to judicial review; (4) even if Secretary's authority in case was nonreviewable, his failure to comply with Department regulations would subject decision to review, and (5) evidence was not sufficient to establish that political interference in revocation decision rose to level of impermissibility.

Petition for permanent injunction denied.

Ryan, Ryan & Fitzgerald, North Palm Beach, Fla., for plaintiff.

J. V. Eskenazi, U.S. Atty., Miami, Fla., for defendant.

ROETTGER, District Judge.

THIS CAUSE is before the court on the petition of plaintiff Nikolaas "Kallie" Knoetze for a permanent injunction. Plaintiff, the number-two ranked heavyweight challenger in the world and a native of South Africa, seeks a permanent injunction against the revocation of his visa by the Secretary of State, Cyrus Vance. The Immigration and Naturalization Service also refused to grant his application for a change of nonimmigrant status to an H-class visa, which would have permitted him to work in this country, solely on the basis relied upon by the Secretary of State in revoking the visa under 8 U.S.C.A. § 1201(i) on January 8, 1979.

The Secretary of State bottomed his revocation upon an admitted conviction of plaintiff in South Africa. The South African charge against plaintiff was "attempting to obstruct or impede the process of justice" while a policeman. This had been felt by the U.S. Consul in Johannesburg to be a misdemeanor falling within the petty offense exception of the Immigration and Nationality Act, 8 U.S.C.A. § 1182(a)(9); consequently, the B-1/B-2 visa was issued December 14, 1968. On review the Secretary of State determined that the offense corresponded to a felony rather than a misdemeanor and revoked the visa. No notice, which 22 CFR § 41.134(b) requires "if practicable", of the proposed revocation was given plaintiff nor did the government make any attempt to claim that the giving of notice was impracticable.[1]

Plaintiff contends that the action of the Secretary of State in revoking the visa (1) was legally incorrect in that the South African offense in question merely corresponds to a misdemeanor rather than a felony; (2) that there was impermissible political interference exerted upon the Secretary and the Department of State officials in

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[1] Inasmuch as plaintiff's whereabouts were readily ascertainable by reading the sports pages, the lack of such contention is understandable.

making the determination; and (3) he was denied equal protection of the law.

PROCEDURAL HISTORY

Suit was filed on January 10, 1979, before plaintiff had actually received notification of the revocation by the State Department. Plaintiff alleged that he had been advised by the news media that revocation was imminent. Notice was given to the United States Attorney's office in the Southern District of Florida on that day and an emergency hearing was scheduled for Orlando, Florida on the next afternoon, January 11th, 1979.[2]

At the hearing the court received certain documentary exhibits as to the revocation and heard argument of counsel. The court issued a restraining order on the authority of *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961). In the *Estrada* case petitioner had a nonimmigrant visa but the District Director of the Immigration & Naturalization Service refused to admit the visa holder into the United States. The petitioner sought a mandatory injunction against the Director of the Immigration & Naturalization Service in Miami permitting their entry into the United States. The District Court dismissed the complaint for lack of jurisdiction and the Fifth Circuit Court of Appeals reversed and remanded for a hearing. In view of the fact that an alien who is inside the United States and holding a visa has greater rights than one who is holding a visa and is seeking admission to the United States, the rationale of *Estrada*, contained in footnote 2 at page 692, compelled the issuance of a temporary restraining order in order that plaintiff could present his arguments in the District Court. See also, *Lennon v. Immigration & Naturalization Service*, 527 F.2d 187, 195 (2d Cir. 1975).

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[2] The hearing was held in Orlando, although it is not in the Southern District of Florida, because the undersigned judge was attending a Judges' Workshop for United States District Judges of the Fifth Circuit which was in progress in Orlando. The hearing was held in the United States Courthouse in Orlando through the hospitality of Chief Judge Young and Judge Reed. No objection was made by either party to the holding of the emergency hearing in Orlando.

[1] At the hearing on January 22 the court concluded that plaintiff had been afforded no opportunity to develop the question on the issue of the impermissible political interference; consequently, the hearing was continued for those purposes only until Friday, January 26.[3]

[2] At the January 26 hearing plaintiff presented his evidence consisting of depositions of various persons in the State Department because the intervening time of four days did not permit much discovery by the parties. The government then moved to reopen on the first issue and presented an expert on South African law who had been contacted by the government for the first time on the previous day. The court granted the motion but pointed out to counsel that fairness required that plaintiff be given an opportunity to locate an expert on South African law of his choosing. The government refused to stipulate to the continuation of the status quo under the restraining order[4]; consequently the court sua sponte

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[3] The temporary restraining order, with notice, expired on the date set for the consolidated final hearing on January 22, 1979 (January 21 fell on a Sunday). The court extended the temporary restraining order without objection of either party for ten days. Neither restraining order was set forth on a separate document but announced from the bench, the first because of the emergency nature of the proceeding and the lateness of the hour. Neither party has objected and any defect is considered waived.

[4] An argument could be made by the State Department, although the court doubts its validity, that upon the expiration of the restraining order plaintiff's one year visa expired forever and that he would have to reapply for a visa. The court is fully aware that the non-issuance of a visa by a Consul anywhere in the world is not reviewable by any United States Court. E.g., *Estrada v. Ahrens*, 296 F.2d 690 at n.2 (5th Cir. 1961). Any person smart enough to be a Consul in Johannesburg, or elsewhere, is smart enough to figure out the decision the State Department would like the Consul to make, especially in view of the dressing-down given by the Department to the Consul in a cable.

announced that it would reach a decision on the issue of preliminary injunction first and granted it on January 31.[5]

REVIEWABILITY OF REVOCATION BY SECRETARY

[3] A threshold question exists whether plaintiff is entitled to judicial review of the Secretary of State's decision to revoke his visa. The Immigration and Nationality Act vests the Secretary with authority to revoke an alien's visa and grants the Secretary leave to exercise his authority "at any time, in his discretion." 8 U.S.C. § 1201(i). Based upon this language, it is possible to argue that Congress intended either to prohibit judicial review of the Secretary's decision to revoke a visa or to commit such decision "to agency discretion by law," 5 U.S.C. § 701(a)(2), within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, thereby rendering the decision non-reviewable.

[4-6] The court begins with "the presumption that an administrative act is subject to judicial review unless there is a persuasive reason to believe Congress decided to deny review." *Graham v. Caston*, 568 F.2d 1092, 1096-7 (5th Cir. 1978). The permissive phrasing of the provision granting the Secretary authority to revoke visas hardly constitutes an express prohibition of review. *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1969). Defendants thus bear the heavy burden of overcoming the presumption of

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[5] The final hearing was held on February 9 with final memoranda due on February 16 with the intention that the final ruling would issue in a few days. The government's final memorandum was filed on February 20 and on February 21 the New York Times published an unsigned editorial expressing its opinion about what the decision should be — based on facts totally different from the evidence contained in the State Department file. The court apologizes to the parties for the delay but the court promptly stopped working on the decision for a week because of the editorial for an obvious reason: lest the court appear to be influenced by the Times' vaunted reputation if the decision were for the government or to be antagonized by its blatant timing if the decision were for the plaintiff.

reviewability by presenting convincing evidence that it was the intent of Congress to preclude review. *Alameda County v. Weinberger*, 520 F.2d 344 (9th Cir. 1975); *Fekete v. U.S. Steel Corporation*, 424 F.2d 331 (3rd Cir. 1970); *Guerrero v. Garza*, 418 F.Supp. 182 (W.D. Wis. 1976). Defendants have offered no evidence of congressional intent and have not met their burden of proof.

[7,8] The exception to reviewability in cases of acts "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is narrow in nature. It is "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply' ". *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). In the instant case the court finds that the Immigration and Nationality Act read as a whole presents a body of applicable law which cannot be ignored by the Secretary in regard to aliens already admitted to this country. It thus subjects the Secretary's decision to revoke the visa of such aliens to judicial review.

[9] The court's holding that the Secretary's decision in this case should be and is subject to review is strengthened by the fact that the Secretary chose not to follow the procedures established in regulations adopted by the Department of State for the revocation of visas. Those regulations require that notice of a proposed revocation and opportunity to oppose said revocation be given "if practicable." 22 CFR 41.134(b). There has been no evidence that the giving of notice and an opportunity to be heard was impracticable in the instant case. The Secretary's contention that consular officers, but not himself or assistant secretaries, are obliged to follow the Department's regulations is rejected by the court. In these circumstances even if the Secretary's authority in the case was nonreviewable his failure to comply with his department's regulations would subject his decision to review. *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Graham, supra*, at 1097.

[10] Finally, even if any debate existed as to the foregoing principles, where plaintiff has colorably raised the issue of impermissible political interference, reviewability of an agency decision is apparently required under *Lennon v. Immig. & Naturalization Serv-*

ice, 527 F.2d 187, 195 (2d Cir. 1975), also, *Center on Corporate Responsibility, Inc. v. Shultz*, 368 F.Supp. 863 (D.D.C. 1973). Although *Lennon's* requirement of review is only dictum and from another circuit, the court feels the procedure it suggests is persuasive. True, the court could stay this proceeding while plaintiff followed the traditional review pattern of appealing to the Board of Immigration Appeals, with direct review in the Fifth Circuit, but the issue raised of impermissible political interference would remain unless Knoetze prevailed. And *Lennon* suggested expeditious handling in the District Court of such claims. The fact that the traditional review process might exhaust the nine months left on plaintiff's visa dictated, in this court's judgment, that the issue be resolved. The court is unaware whether plaintiff has pursued an appeal to the Board of Immigration Appeals.

WHAT TRIGGERED STATE DEPARTMENT'S ACTION

The State Department's file was introduced by stipulation and revealed the following chronology of events leading up to the action of the Secretary of State, through the Assistant Secretary of State, of revoking plaintiff's visa:

Apparently what triggered this entire chain of events were two messages of December 14, 1978 from SWAPO[6] to the U.S. Mission at the United Nations, one seeking the release of six leaders of SWAPO recently detained by South Africa and the other message dealing with South African boxers Knoetze and Goetzee, which claims (erroneously) that Knoetze killed a young man as a policeman. The SWAPO message re Knoetze continues "we are looking forward to the Honourable Secretary of State for intervention to prevent desperate racist agents from competing on your soil."

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[6] SWAPO (Southwest Africa People's Organization) seeks the establishment of the nation of Namibia out of Southwest Africa, now governed by South Africa.

The SWAPO messages were contained in two cables of December 16, 1978, from the United States Mission to the United Nations to the Secretary of State with an in-full copy to the Embassy in Pretoria among others.[7]

On December 19, 1978 a dispatch was sent from the American Embassy in Pretoria to the Secretary of State in connection with two South African boxers although the context was devoted almost exclusively to plaintiff. The body of the dispatch discusses two separate charges against Knoetze in the preceding year, one of a shooting of a black youth in Atteridgeville, in which Knoetze was absolved of any guilt. The second charge is the one which is the basis for the State Department's revocation although the dispatch incorrectly asserts that Knoetze attempted to persuade black persons not to bring charges against a policeman; in fact, they were white, as revealed in subsequent documents.

By a letter dated December 15, 1978 a staff assistant for the "Southern African Project" of the Lawyers' Committee for Civil Rights under the law had written the Secretary of State requesting a denial of visa to Knoetze. The letter contains a number of inaccuracies and apparently was received in the Department on the 19th of December; a number of notations, mostly illegible, are contained on the letter as to action taken.

There is no documentation contained in the file or evidence of other activity in the intervening time until the 28th of December. On the afternoon of the 28th the second barrel was triggered: Landon Butler, an assistant in Hamilton Jordan's office at the White House, called Under Secretary of State Benjamin Read and told Read he had directed the Rev. Jesse Jackson to get in touch with Read about Jackson's concern about the Knoetze case. Read knew nothing about it at that time but responded that he would be glad to receive a telephone call from Rev. Jackson. Rev. Jackson called

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[7] The cables recited the SWAPO messages in full and, curiously inasmuch as the Secretary of State was the receiver rather than the sender, directed certain action be taken at various U.S. embassies in compliance with the SWAPO request in the cable not dealing with the boxers.

Read during the evening of the 28th around 7:00 P.M. or 8:00 P.M. and a meeting was set for the 3rd of January. Read had not met or talked with the Rev. Jesse Jackson prior to that time.

Two cables were sent on the 29th from State to Pretoria seeking a translated copy of the statute and the court record under which Knoetze was convicted.[8]

On Saturday, the 30th of December a cable was sent from the American Embassy in Pretoria to the Secretary of State; it inquired whether State had checked with INS (Immigration and Naturalization Service) concerning an application of Knoetze for a change of status to permit him to fight.

On January 2, 1979 Mr. Black of INS advised Devlin (of State) that if Knoetze is a bona fide boxer he would generally have no difficulty in receiving approval of a petition for an H-1 visa to permit him to fight in the United States. Black also advised that INS would have grounds for declining adjustment of the visa *only* if State advised INS that this visa was issued in error and that grounds of ineligibility existed.

On January 3, 1979, a meeting was held for an hour among the Rev. Jesse Jackson, Carl Holman (the President of the National Urban Coalition), Under Secretary of State Benjamin Read, Assistant Secretary of State Barbara Watson, Carl Shepherd (Chief, Advisory Opinions Division in the Visa Office of the Department of State), and several associates of the Rev. Jesse Jackson.

Under Secretary Read assured Rev. Jackson that a wire had been sent to Pretoria – implicitly from his answer and also from the chronology of events in response to the call from Jordan's office on the 28th about the appointment to be made with Rev. Jackson.

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[8] Throughout the file and particularly in this cable there are repeated reference to the applicability of note 1.4 of 22 CFR 41.91(a)(27). This particular cable adds "the Department regrets that Post did not recognize applicability of note 1.4 of 22 CFR 41.91(a)(27) in this case given political and social sensitivity re human rights."

Examination of the note and regulation reveals it is totally inapplicable to Knoetze.

Under Secretary Read described the meeting's essence: the concern of Rev. Jackson about the shooting and maiming of a 15-year old youth in a Soweto township incident in 1976; that Jackson felt the Administration's Human Rights Policy had no meaning if persons such as Knoetze were allowed entry; that it was wrong for Knoetze, with his background, to be issued a visa and have this "sort of promotion and gainful employment"; and that Rev. Jackson's views about South Africa's apartheid were discussed. Read did not mention any discussion with Rev. Jackson of the charge that was the ultimate basis for revocation.

MATERIAL AVAILABLE TO THE STATE DEPARTMENT PRIOR TO REVOCATION

A. Favorable to Knoetze

The State Department had available at the time of the visa's revocation a report from the Police Commissioner of Johannesburg about the shooting of a black youth at Atteridgeville, which revealed that Knoetze was one of several policemen there under the command of the Warrant Officer sent to help quell a riot of black youths. The youths had fired a municipal beer hall and attacked the police; then the Warrant Officer gave the order to his men to fire warning shots. The shots were fired by the police officers either into the air or at the ground and one bullet ricocheted from the ground and struck a black youth in the leg. All the police were found not guilty because there was no proof that any particular police officer hit the youth. The Police Commissioner added that Knoetze was known on the police force for having special sympathy for blacks and for a record of having helped many blacks out of difficulties.

Johannesburg had also cabled the Department as to the inquiries it had made of various South African jurists as to the Knoetze offense: Judge C.S. Margo, of the Supreme Court of the Transvaal Division; Advocate (similar to "barrister" in the British system) Isie Maisels, who is not only a Johannesburg practitioner but also Chief Justice of the Botswanna Supreme Court[9]; Advocate Sydney Kent-

[9] The Government's expert on South African law Philip Hare, testified that Maisels was the outstanding advocate in South Africa and he had

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ridge who was the Advocate for the Biko family in the Biko incident; and attorney ("solicitor" in the British system) Victor Mansell. All agreed that there are no distinctions between felonies and misdemeanors in South African common law (derived from the Roman-Dutch law) and that although obstructing the course of justice can be a serious offense there is a range of gravity with Knoetze's crime "coming at the lower end". More serious offenses would entail tampering with a witness, attempting to influence a judge, etc.

Kentridge said he would equate Knoetze's offense with a "misdemeanor" in the United States law;[10] Maisels said that the magistrate could have imposed a sentence of five years but the magistrate's imposition of a relatively light fine indicates that his actions were extenuating; Judge Margo said that Knoetze's offense was "unquestionably a misdemeanor" and that imposition of a "nominal fine" was testimony that the particular offense was "not serious" as traffic fines were often larger. In addition, if the matter had been serious the magistrate could have remanded the case to a higher tribunal (the Supreme Court).

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the greatest respect for him. In addition, he also testified that judgeships in South Africa were awarded to advocates on the basis of their ability and noted that Maisels was Chief Justice of Botswanna. Botswanna is a neighboring and stable Black government which opposes South Africa's policy of apartheid. The witness did not expressly say so but the inference is clear that apparently Maisels has not been appointed to the bench because his views do not square with the South African government's.

[10] The defendant's expert witness on South African law, Jerald Josman, testified that Kentridge is one of the most eminent barristers in South Africa, a pre-eminent civil rights' advocate, who has an international practice. Kentridge not only represented the Biko family in the legal proceedings going into the highly publicized and tragic death of the young black leader, Biko, but Kentridge had also taught at Harvard Law School for approximately six months about 4 or 5 years ago. This tour at Harvard lends credibility to Kentridge's interpretation of the gravity of the offense under United States law but apparently it was not known by the State Department at any time prior to the final hearing in this case. Mr. Josman also opined that Kentridge would not adopt a chauvinistic attitude in giving his opinion.

B. Material Used For Revocation

The facts most favorable to the decision of revocation which were before the State Department at that time were photocopies of pages 1113 thru 1117 inclusive of a treatise's treatment on defeating or obstructing the course of justice. The pages are from Gardiner & Lansdown, *South African Criminal Law and Procedures* (6th Ed., 1957) "Defeating or Obstructing the Course of Justice". This edition has been superseded. The treatise points out it is more common to charge the attempt. A number of instances are set forth in the textual treatment, but none are precisely on point with the allegations about Knoetze's offense. The material set forth in the photocopies is identical to that contained in a cable from Johannesburg on the 5th of January.

State's cable from Johannesburg indicated that "Knoetze was charged because he attempted to persuade the parents of a white youth (not black) to drop charges of common assault against two South African policemen. Apparently, Knoetze knew the parents and asked that they drop the charges against the two policemen on the ground that convictions would harm their career. The cable continued: "The police officer investigating the common assault charge became aware of Knoetze's attempt to have the charges dropped and proceeded to charge Knoetze with attempting to defeat the course of justice." Knoetze was convicted and fined 150 rands, (one rand equals 1.15 dollars) [approximately 175 U.S. dollars at the time]. Not unexpectedly, some of this information is not precise, but that is the information State had available for its decision to revoke plaintiff's visa.

INFORMATION ABOUT SOUTH AFRICAN OFFENSE SUBSEQUENT TO REVOCATION

It is not the function of the court to re-try the South African case. However, what happened in the South African proceeding has some bearing on the question of whether the State Department exercised its discretion freely or whether it acted as an instrument of impermissible political interference.

Information obtained subsequent to the revocation revealed that Officer Bosch, a sparring partner of Knoetze, was the police officer

investigating a stolen car. Bosch charged two white youths with the auto theft and apparently hit one (or both) as well. The parents then charged Bosch with assault; Knoetze intervened in behalf of his friend and attempted to have the parents drop the charges.

From testimony subsequently introduced there were four charges against Knoetze, three of them were simple assault matters and they were in addition to the instant charge. When a policeman is charged, the Attorney General in South Africa does not delegate authority as to the manner of filing but exercises it personally. Because there were four pending charges, the Attorney General decided to have the case filed in the Regional Magistrate's court despite Knoetze's being a first offender. The three simple assault charges were separated out and Knoetze paid a fine (60. Rand total) without having to go to court, just as one in America can mail in a check to pay for a traffic offense without going to court.

[11] It must be noted that simple assault charges are misdemeanors not involving moral turpitude and don't count against the visa holder under the petty offense exception of the Immigration Act. State knew about one assault charge at the time of the revocation decision, that one being when Knoetze stopped an off-duty fellow-policeman who had run a stop sign on his motorcycle. Knoetze hit him when the fellow-policeman became "cheeky".

After the guilty plea there was a discussion of a potential problem on Knoetze's part in getting future visas to the United States as the result of his offense. The Magistrate sternly lectured Knoetze and clearly set the punishment as high as it was because of Knoetze's status as a policeman. Although the government contended the harsh words of the Magistrate indicate the matter in South Africa was a very serious one and could not be considered as a minor offense, the court would remind government counsel of the at least equally stern lecture given by this — and presumably other American courts — to lawyers and accountants who fail to file their own income tax returns, which is only a misdemeanor.

Apparently, there is no technique for plea bargaining in South African courts as we know it in America so Knoetze chose to plead guilty to the charges.

The court personally abhors the policy of apartheid in South Africa. But the court must pause to point out that the testimony of the two expert witnesses on South African law, now practicing in America or preparing to do so, and the language of the Magistrate show a deep, refreshing devotion to the law on their part. So does the action of the Attorney General in South Africa in holding a policeman to a high standard of accountability, even for an offense of striking a fellow policeman who had ignored the law.

The government objected to any questioning of plaintiff Knoetze about his trial in South Africa or any events leading up to the charges. The court permitted the questioning and would have sustained the objection; however, an answer by the government's expert witness on South African law, Philip Hare, at a later session of the final hearing caused the court to consider one or two answers.

Knoetze was asked if the charges against him included an allegation for the use of bribery, intimidation or threats of force and his reply was in the negative. This matter, of course, is ascertainable from documentary exhibits. When asked if he in fact used bribery, intimidation, force, or threats of force against the parents of the youth in the Bosch case, his answer was a guileless and sincere: "No, your Honor, I didn't." The question was asked by his counsel, but the court was watching Knoetze very closely and the expression on his face, especially an instantaneous smile that passed over his face, left the court convinced that Knoetze did not bribe, intimidate or try to intimidate the parents of the youth in asking them to drop the charges. He testified that he asked them to drop the charges against Bosch because Bosch already had his last warning in the South African police force and he was trying to "help my friend". He emphatically said that he told the parents that they had "the last say" about whether to drop the charges and that they had to decide whether they wanted to drop them or not. Knoetze's answer was so sincere and so earnestly given that it troubled the court greatly when the government's expert, Philip Hare, answered that if the facts had been as Knoetze testified to, he doubted that charges would have been brought.[11]

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[11] Although the court recognizes the perils of even considering the

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On January 23rd State requested an English translation of the indictment in the Knoetze case and his plea. On that same day it was cabled back to State from Pretoria. The indictment charged that Knoetze attempted to convince two persons (one parent of each of the respective youths who had charged Officer Bosch as their assailant) not to identify Bosch on an identity parade at the police station.

The alternative charge was that he "enticed" the parents to "defeat the ends of justice by trying to convince them to advise their children to withdraw certain charges of assault against David Bosch." The indictment itself actually charges that Knoetze, while being near the Central Police Station in Pretoria, "falsely claimed [to the parents] that he was the investigating officer on the mentioned cases of car theft and that he had influence over the result of the abovementioned charges and through word and/or deed tried to convince the abovementioned parents to advise their children to withdraw the charges against David Bosch so that David Bosch would not be prosecuted on the charges."

To these specific charges defendant entered a plea of guilty. The matters charged in the indictment are, of course, far more serious matters than the information available to State at the time the decision was made to revoke Knoetze's visa. Additionally, they are far more serious than the facts set forth in Knoetze's testimony.

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possibility of re-trying foreign prosecutions in determining American visa matters and doesn't intend to do so, it is most disturbing to consider that the harsh penalties of revocation and deportation, even under a non-immigrant visa, can be visited upon someone for a proceeding against that person in a country that (1) makes no distinctions between felonies and misdemeanors, as in American law; (2) considered it a lenient matter and thereby equivalent to a misdemeanor under American law; and (3) the facts as testified to by Knoetze left the court convinced it is unlikely that a United States Attorney would take the matter to a grand jury or prosecute on a felony basis in America for attempting to persuade family acquaintances to drop charges against a good friend where no force or intimidation or bribery were used and where the final decision was left up to the parents about whether or not to drop the charges.

WHAT TEST SHOULD BE APPLIED

In *Soetarto v. Immigration & Naturalization Service*, 516 F.2d 778 (7th Cir. 1975), the court followed the formula set forth in *Giammario v. Hurney*, 311 F.2d 285 (3d Cir. 1962) in determining first if the substantive offense for which the immigrant was convicted abroad is a misdemeanor or a felony. The opinion continued: "[t]he standards to be applied in making this determination are those of United States law." 516 F.2d 780.

In *Soetarto* the petitioner had been convicted of two offenses of larceny in the Netherlands and contended that they were misdemeanors. The *Soetarto* court looked to the District of Columbia code as an expression of Congressional intent; that Code provides that if the value of the property stolen exceeds $100, the crime is grand larceny, which carries a possible sentence of more than one year. It is therefore a felony rather than a misdemeanor. 18 U.S.C. § 1(1). Soetarto's two offenses in the Netherlands involved thefts of $135 and $100. The opinion is unclear whether the second offense was more or less than $100 but the determination is unnecessary because the theft of $135 would constitute a felony under the District of Columbia Code. That conclusion obviated petitioner's benefiting from the "petty offense" exception of 8 U.S.C. § 1182(a)(9) [Sec. 212(a)(9) of the Immigration and Nationality Act].

Of particular interest to this court is the fact that a concurring opinion was filed by Circuit Judge Rives, Senior Circuit Judge of the Fifth Circuit, who concurred with reluctance because the sentencing judge had imposed such lenient punishment as to indicate the probable existence of certain extenuating circumstances. He opined that "... deportation without an exhaustive inquiry into the facts and circumstances of the two thefts and into the question of whether Soetarto had been completely rehabilitated leaves undetermined whether or not a just result has been reached." *Id.* at 781.

No case has been found from the Fifth Circuit dealing with the precise question.[12] In a more recent decision than *Soetarto* or *Giam-*

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[12] Apparently only one case has been decided in the Fifth Circuit on a similar question. *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546 (5th Cir. 1952) involving a different statute.

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mario, the Ninth Circuit Court of Appeals in *Patel v. Immigration and Naturalization Service*, 542 F.2d 796 (9th Cir. 1976), expressly refused to follow *Giammario* and *Soetarto* in the following language from footnote 5:

> "5. We do not accept the rule first applied in *Giammario v. Hurney*, *supra*, and adopted in *Soetarto v. United States*, 516 F.2d 778 (7th Cir. 1975), that 'actual punishment' is determined by looking to the maximum possible penalty which could be imposed under an equivalent federal statute. *Barde v. United States*, 224 F.2d 959 (6th Cir. 1955), cited as precedent in *Giammario* and *Soetarto* involved very different facts and issues and does not support the use made of it." *Id.* at 798.

The court observes that the standard of "actual punishment" used for deportation is not expressly set forth in the petty offense subsection of the Immigration Act in connection with revocation of visas; therefore, arguably the rationale in *Patel*, otherwise sound in this court's judgment, does not apply to revocation of visa situations.

If this court were deciding which test should be applied, the legal trail forks: this court is left with a split of the circuits and no controlling decision from the Fifth Circuit.

[12,13] The trail suggested by Judge Rives and *Patel* would appear the better one for the following reasons: *Patel* is more recent; the question of grand or petit larceny in *Giammario* and *Soetarto* is easily translatable: e.g., Chapter 73 on obstruction of justice in U.S.C., Title 18 has eleven sections, five of which are misdemeanors (§§ 1501, 1502, 1504, 1507 and 1508) and the rest are felonies; Judge Rives suggested an exhaustive inquiry into the facts and circumstances of the prosecutions in a foreign country in his concur-

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The appellant was convicted of forgery and stealing and sentenced to serve three years at hard labor. Although the Court of Appeals rejected the contention that an inquiry be made into the pertinent law of the British West Indies as he claimed the offenses were committed while he was a juvenile and that a juvenile court had not been set up in the British West Indies, the court did hold that Immigration officials and "and courts sitting in review of their actions need only to look to the record and the inherent nature of the offense." *Id.* at 548.

ring opinion in *Soetarto*; although Congress has plenary power in the area of deportation Congress must be presumed to expect courts to consider equitable matters rather than reflexively applying rigid tests (See e.g., *Lennon*); and it is settled doctrine that deportation statutes must be construed in favor of the alien. *Immigration & Naturalization Service v. Errico*, 385 U.S. 214, 87 S.Ct. 473, 17 L.Ed.2d 318 (1969); *Font Haw Tan v. Phelan*, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433 (1948).

[14] The obvious Congressional purpose of subsection 212(a)(9) of the Immigration and Nationality Act is to keep persons who are likely to be undesirable residents or sojourners from being in our midst. Federal decisions have applied the tests rather rigidly, with minimal, if any, equitable considerations. Often judges are clearly uncomfortable in such decisions; for example, see Judge Rives' opinion in *Soetarto*, supra; Judge Eisele, dissenting and citing similar opinions, in *Marciano v. Immigration and Naturalization Service*, 450 F.2d 1022 (8th Cir. 1971). (The majority didn't appear to be much more comfortable in deporting a citizen for a crime of statutory rape when it would not have been a crime in 27 of the 50 states.) Rarely has a court looked at the problem and concluded that Congress would not want the court to impose the harsh consequences of deportation by strict interpretation, such as the majority concluded in *Lennon*.

However, this court is confining its consideration to the issue of impermissible political interference, as set forth in *Lennon*, supra. To expand this case into a determination of the test to be applied would possibly give plaintiff two appellate bites at the same apple. Whether State followed a reasonable legal test is a factor for the court to consider on the question of impermissible political interference but whether the test followed is the preferable law is not before this court.

POLITICAL INTERFERENCE

That brings us to the issue raised by plaintiff of impermissible political interference. Almost no law exists dealing with this charge of impermissible political interference. The authority for this

court's considering this issue is the extremely strong dictum in *Lennon v. Immigration & Naturalization Service*, 527 F.2d at 195 (2nd Cir. 1975). Even the dissenting judge concurs as to the issue of political interference in the *Lennon* case. The Court of Appeals considered the claim of John Lennon, one of the Beatles, that his conviction in the United Kingdom for the possession of marijuana should not cause him to be excludable and therefore deportable under 8 U.S.C. § 1182(a)(23).

The court's majority determined that there was minimal gain in effective enforcement by deportation and concluded that it "... cannot imagine Congress would impose the harsh consequences of an excludable alien classification upon a person convicted under a foreign law that made guilty knowledge irrelevant." *Id.* at 194. However, the court continued that if it had not determined that Lennon's contention was correct on appeal it would have directed the District Court to proceed expeditiously with further proceedings on Lennon's claim that he had been selectively prosecuted because of political grounds. Lennon made the charge that he was being deported because he would participate in demonstrations that would be highly embarrassing to the then-existing presidential administration. *Id.* at 190. He also charged that the agency had violated its prior practice and consequently abused its discretion, a charge implicit in these proceedings in connection with the lack of notice. *Ibid.*

Unfortunately, the opinion in *Lennon* provides this court with no landmarks in considering the charge of impermissible political interference other than the court's observation that: "The courts will not condone selective deportation based upon secret political grounds." *Id.* at 195. So at this point the legal trail ends and there are no tracks to guide the court.

This court continued the proceedings for a period of four days during which plaintiff was compelled to travel to Washington and seek to depose various persons in support of its charge of impermissible political interference. The Government was very accommodating to plaintiff and made several individuals available. Essentially, the charge was that the White House intervened with the Department of State to set up a meeting with the Rev. Jesse Jackson,

head of operation PUSH, and also Carl Holman, President of the National Urban Coalition. Mr. Shephard testified that after the meeting he worked extensively on the case, including through the coming weekend, to prepare the legal opinion supporting the revocation and also the letter of revocation. The court's findings on what led up to the revocation have been set forth earlier.

But what showing is necessary for the court to determine whether there has been impermissible political interference? Clearly there must be access to members of the Executive Branch by citizens who are troubled by matters in which they have a legitimate concern. The First Amendment protects the voicing by Rev. Jackson, Mr. Holman and others of their displeasure with actions of the government, as well as their attitudes towards South Africa's policies.

The witnesses from the State Department stoutly deny there was any political pressure placed upon them by the White House. However, political pressure is rarely as overt or crass as a bribe; even extortion can be accomplished by innuendo. 31 *Am.Jur.*2d, Extortion, Blackmail, and Threats § 10 and cases cited therein. A suspicion of impermissible political interference would hardly exist if, for example, there was a meeting between the leaders of the AFL-CIO and officials of a Republican administration, or conversely, between officials of the National Association of Manufacturers and the typical Democratic administration. But unquestionably Rev. Jesse Jackson and Carl Holman, President of the National Urban Coalition, are two of the three or four most prominent Black Leaders in the United States. It is a safe conclusion that political analysts, with the possible exception of Messrs. Scammon and Wattenburg, would consider that the Black political strength for Jimmy Carter was the key factor in his election to the presidency in 1976. This factor raises more than a suspicion of political interference: at least an inference of political interference is implicit in such a situation.

A phone call from the office of the man closest to the President can hardly be brushed aside as a mere call of introduction. One need only recall the columnists' discussions in the aftermath of Watergate of the power of a junior White House aide who calls an

agency with the introduction: "This is the White House calling . . ."[13]

In the instant case the phone call from Hamilton Jordan's office was hardly innocuous. It arranged a meeting on short notice with an Under Secretary and an Assistant Secretary of State. Testimony is clear that Rev. Jesse Jackson later called Under Secretary Read a half-dozen times about this matter.

The Government offered the testimony of an expert on South African law on January 26 but the expert had only been contacted by the State Department the day before. At that same hearing it also offered the translated transcript of testimony of the proceedings in South Africa involving plaintiff despite the fact that the State Department had not received the translation until January 24, 1979. Curiously, the Government contends that its not having such materials during the decision-making process in early January does not support the charge of impermissible political interference.

A number of factors may be summarized, mostly chronological, which show the Extent of the political interference: (1) in February, 1978 Knoetze received a temporary visa to come to the United States to be a spectator at the Ali-Spinks fight in Las Vegas. Ambassador Bowdler was not in South Africa but at the United Nations and the Department of State called him personally about Knoetze's visa application; then the Department advised Johannesburg it had no objection to the issuance. From the evidence 5 million visas are issued annually by the Department of State. One of the State Department officials claimed that Knoetze's case was handled exactly the same as if he were from any nation other than South Africa. Based on State's reaction both in February and December that assertion not only lacks credibility, it is laughable. (2) Both SWAPO messages received immediate action by the United States, one directing immediate compliance in connection with SWAPO leaders held in South

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[13] From two years in the Washington bureaucracy this court remembers with some amazement the over-reaction on the part of career supergrades as well as career secretaries to a phone call that began "This is the White House calling . . . ."

Africa and the other accomplished the requested result with remarkable speed, especially considering the Christmas and New Year's holiday periods. (3) The White House set up the meeting on short notice between two of its major political backers and an Under Secretary and an Assistant Secretary of State. (4) What was discussed at the meeting was not the basis ultimately stated for the revocation, although it undoubtedly was the reason. (5) A rush to revocation ensued with less than a week before the revocation issued. (6) Ample material possessed by State that plaintiff was sympathetic to blacks and the opinions of eminent South African jurists and advocates — especially Maisels' and Kentridge's — that the offense was a misdemeanor were ignored by the Department. (7) No notice was given to plaintiff of the proposed revocation despite its being required by State Department regulations.

TEST OF IMPERMISSIBLE POLITICAL INTERFERENCE

Although the court in *Lennon* does not treat the issue of political interference in any detail it did indicate that Lennon's claim was entitled to expeditious relief in the District Court and the District Court should "accord him the relief to which he may be entitled. The courts will not condone selective deportation based upon secret political grounds." 527 F.2d at 195.

In *Center on Corporate Responsibility, Inc. v. Shultz*, 368 F.Supp. 863 (D.D.C. 1973), the plaintiff charged that it was qualified to receive deductible charitable contributions under the Internal Revenue Code and that the Internal Revenue Service's issuance of a ruling that plaintiff was not exempt from federal income taxes and not qualified to receive deductible charitable contributions was based upon improper White House influence.

The District Court cited the evidence, the discovery problems, and the claim of executive privilege as to certain exhibits. The court concluded that the defendants failed to comply with the court's discovery orders and made an improper claim of executive privilege, which thereby precluded the court from determining the issue of political interference or intrusion. The court deemed the plaintiff's complaint established as to that issue.

However, the District Court at the beginning of its discussion on that particular issue set forth the test as: "A showing of political influence renders the Service's ruling null and void. It is outside the law." 368 F.Supp. at 871. The opinion continued: "The Court is concerned not only with direct political intervention, but also with the creation of a political atmosphere generated by the White House and the Internal Revenue Service which may have affected the objectivity of those participating in the ruling in the Plaintiff's case." *Id.* at 871.

At first blush the District Court's opinion appears to indicate that *any* showing of political influence would render the agency's ruling null and void. This court cannot go that far. In fairness, the District Court in the District of Columbia apparently would not have gone that far because later in the opinion this observation appears: "The Plaintiff has met all the requirements for exemption status and would have been entitled to a favorable ruling even if the fact of political intervention had not been established." *Id.* at 873. The court doubts that in *Center on Corporate Responsibility* the District Court would have held that political interference, however slight, is sufficient to constitute an impermissible political interference. In both *Lennon* and *Center* that precise question did not present itself and neither gave that precise holding.

The citizens of the United States of America have a right to expect the Executive Branch and the Legislative Branch to be free in their respective decision-making processes from impermissible political interference. This seems more critical than ever with the rapid rise of the single-issue pressure groups. In the Constitution the framers took steps to insure the Judicial Branch would be free of such pressures. It would be naive to assume that political influence and some political interference would not occur in the Executive and Legislative Branches of the Government. On balance, that may be necessary to keep a partisan political system operating. However, the key is whether the political interference is impermissible: did the pressure exerted result in an abuse of discretion? Did the Department of State give in to the pressure and make an untenable decision? State clearly went into high gear and when it couldn't rest the revocation on the shooting injury to the black youth, it found

another peg to hang its decision on, despite the absence of material it now urges upon the court as supporting its decision.

[15] However, with the existence of the *Giammario-Soetarto* test, even if less sound, and some similarities — albeit sparse from the materials available to State at the time of its decision — between the offense in South Africa and 18 U.S.C. § 1503, this court cannot hold, without more, that the political interference rose to the level of impermissibility. This court will not intrude onto political territory that is the domain of the Executive Branch, absent very compelling evidence of impermissible political interference.[14] The court does not reach the question of whether tardily obtained supporting material would redeem a decision, which otherwise resulted from impermissible political interference.

This court must therefore deny the petition for a permanent injunction.[15]

DONE AND ORDERED this 16th day of March, 1979.

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[14] This memorandum opinion will constitute the court's findings of fact and conclusions of law in compliance with Rule 52.

[15] After nearly thirty legal-size pages of this opinion a few moments of reflection causes the undersigned to reflect that a citizen could have analyzed this case in a couple of paragraphs. First, the political leader of a special interest group spends a political chip. And a political system responds politically. And for what: about a heavyweight fighter who's not Galahad. But hardly Ahab, either.

His problem is he's a South African who wants to fight for dollars, while most Americans want to acquire Krugerrands. If he were an American, whether his errant loyalty to a friend amounted to felonious conduct or only a misdemeanor would hardly bar his boxing progress. After all, heavyweights often aren't milquetoasts. And some of the American variety are felons. E.g., his opponent, Bill Sharkey, in the fight State tried to stop, spent several years in jail for manslaughter. And one doesn't have to be a fight fan to recall quickly other American felons recently in the heavyweight ring: Sonny Liston, Ron Lyle, and even Muhammad Ali — draft evasion is a felony.

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One conclusion leaps from this case: If Knoetze hadn't fired a shot which ricocheted and hit a black youth during a riot, this matter would not have been singled out of 5 million visas issued annually for attention. Not by SWAPO, Rev. Jesse Jackson, or anyone else. And Knoetze would prove in an American ring whether he is worthy of a world title rather than slugging it out in the courts and the mire of Foggy Bottom.

If State ultimately prevails, who loses? Knoetze, to be sure. His possible opponents — Spinks, Norton, Holmes, Ali — would also lose. And if he is a great fighter, millions of American fight fans, black and white, also lose unless the satellite brings us the fights. If he isn't great in the ring, it won't matter. Except the Secretary of State has injected international politics into sports — one more time it has occurred in the world. It is another opportunity for some increase in international understanding wasted. Hopefully, in the future the Executive Branch will not continue to politicize international sports, as it did here.

It is the court's personal hope that Knoetze not only will be a great fighter but will also use his prestige to help eradicate apartheid.

APPENDIX C

CONSTITUTION

AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

UNITED STATES CODE ANNOTATED 8 § 1201

PART III – ISSUANCE OF ENTRY DOCUMENTS

§ 1201. Issuance of visas – Immigrants; nonimmigrants

* * *

Revocation of visas or documents

(i) After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance: ***Provided,*** That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 1323(b) of this title for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation. June 27, 1952, c. 477, Title II, ch. 3, § 221, 66 Stat. 191; Sept. 26, 1961, Pub.L. 87-301, § 4, 75 Stat. 651; Oct. 3, 1965, Pub.L. 89-236, §§ 11(a), (b), 17, 79 Stat. 918, 919.